Nos. 04-277 & 04-281

In The Supreme Court of the United States

Supreme Court, U.S.
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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, et al.,

Petitioners,

v.

BRAND X INTERNET SERVICES, et al.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

BRAND X INTERNET SERVICES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS STATES AND CONSUMER GROUPS IN OPPOSITION TO PETITIONERS

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February 22, 2005

QUESTION PRESENTED

Whether the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, classifies the high-speed transmission component of cable modem service as a telecommunications service within the meaning of § 153(46).

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents States and Consumer Groups state the following:

The California Public Utilities Commission, the Vermont Public Service Board, and the Vermont Department of Public Service are governmental entities.

The Consumer Federation of America and Consumers Union (Consumer Groups) do not issue shares to the public and have no parent corporations that issue shares to the public. The Consumer Federation of America is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.

Consumers Union, publisher of *Consumer Reports*, is an independent, nonprofit testing and information organization serving only consumers.

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STATEMENT

This case is not about regulating the Internet. It is about classifying the connection that enables residential customers to get on to the Internet, and how Congress sought to expand access to that connection by both consumers and competitors alike. When customers connect to the Internet by dial-up telephone service, that connection (or pipeline) is classified as a telecommunications service under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Act" or "1996 Act").[1] When customers access the Internet by a high-speed telephone line, known as digital subscriber line service ("DSL"), that pipeline has historically been classified under the Act as a telecommunications service. This case presents the question of whether Congress intended to classify the pipeline that connects customers to the Internet via high-speed cable lines as a telecommunications service. The answer is plainly yes.

a. Connecting to the Internet. Connecting to the Internet is becoming of critical importance in the way Americans live, learn, and work. With high-speed or broadband connections, high school students in rural areas can view museum collections in a distant city, health care clinics can transmit a patient's X-rays for expert evaluation hundreds of miles away, and a working mother can

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[1] All statutory references are to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq*. Relevant provisions are set forth in the attached Statutory Appendix. "Pet. App." refers to the FCC's Appendix accompanying its petition for writ of certiorari. "FCC Br." refers to the Brief for the Federal Petitioners. "Cable Ind. Br." refers to the Brief For Cable-Industry Petitioners.

conduct her international accountancy business from home. And because high-speed connections enable video conferencing, the Internet has become a critical communications tool for the hearing-impaired. None of this is possible with slow-speed, dial-up connections to the Internet. Pet. App. 42a n.2.

Yet to participate fully in modern life, consumers must not only have a means of accessing the Internet, but that access must be affordable. Today, the cost of connecting to the Internet is the main barrier to connectivity. According to recent data compiled by the United States Department of Commerce, those who live in rural communities, those who have low incomes, and those who are disabled are far less likely to have high-speed access to the Internet in their homes.[2] A "digital divide" exists.

To bridge this divide, Congress expanded the historic goal of universal service, and declared as an important principle in the Telecommunications Act of 1996 that "access to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2). Congress specifically instructed the FCC as well as the states to use their "regulating methods" over "telecommunications services" to ensure that all Americans have the high-speed "advanced telecommunications capability" that connects them to the "data, graphics and video telecommunications" available on the Internet. § 706(a) (reproduced at note to 47 U.S.C. § 157).

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[2] U.S. Department of Commerce, Economics and Statistics Administration, National Telecommunications Administration, *A Nation Online: Entering the Broadband Age* (Sept. 2004), Appendix Table 1. http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf.

One of the high-speed means by which consumers can connect to the Internet is cable modem service. The FCC defines cable modem service as having two separate components: a transmission component which connects customers via high-speed cable lines to the Internet, and an information component, which consists of services such as e-mail, a personal web page, or database services like LEXIS. Pet. App. 86a, 94a.

The Internet itself is simply a collection of interconnected computers dispersed throughout the world that form an international transmission network. *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997). Internet service providers ("ISPs"), as the name suggests, provide access to that network to consumers. Once on the Internet, consumers can search for and retrieve information stored in remote computers, utilize electronic mail, and access news groups. *Id.* at 851-52. Some ISPs offer consumers additional services, such as an e-mail account, a personal web page, or access to their own extensive proprietary networks. *Id.* at 850; Pet. App. 68a.

Consumers, in turn, need to have some way of contacting, or connecting to, the ISPs. Initially, ISPs were standalone enterprises, and customers accessed them via their ordinary dial-up telephone service provided by the telephone company. Ordinary dial-up telephone service that connects end-use customers to the ISP is significantly slower than the relatively high-speed (broadband) transmission network that connects all computers that comprise the Internet, and as a result, creates a speed bottleneck. As technologies developed, telephone companies introduced a new, faster transmission service, known as DSL service, to allow customers to connect to ISPs at speeds many times faster than ordinary dial-up service. With the advent of DSL service, some telephone companies

created their own ISPs, and bundled sales of their DSL transmission service with their ISP services. Later still, cable television operators entered the residential high-speed transmission market, creating their own ISPs and using their cable lines, which are functionally similar to DSL service, to allow customers to have a relatively fast connection to ISP services.

Today, the "last-mile" high-speed link that connects residential customers to the ISP is principally controlled either by the telephone company via DSL service, or by the cable company via cable modem service. Nationwide, cable modem service comprises about 68 percent of the residential broadband market. Pet. App. 51a. Other high-speed networks, such as wireless, are not yet widely available to residential customers. FCC Pet. for Writ of Cert. 5. In many areas, customers have access to DSL service or cable modem service, but not to both. In California, for example, only one in four customers who have access to high-speed transmission service has a choice between DSL service and cable modem service to connect to the Internet.[3] In Vermont, nearly half of the population with access to broadband service has only one choice – either DSL or cable modem service.[4] Where cable modem service is the only high-speed option, the cable operator may charge residential customers whatever it wants for connecting to the Internet.

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[3] California Public Utilities Commission, *The Status of Telecommunications Competition in California*, Second Report for the Year 2002, at 32, http://www.cpuc.ca.gov/word_pdf/REPORT/25310.pdf (Feb. 28, 2003).

[4] Vermont Department of Public Service, *Vermont Telecommunications Plan*, September 2004, at 3-10, http://www.state.vt.us/psd/Menu/Telecomm/telplan4/FinalPlan.pdf.

b. The 1996 Act. Congress enacted the 1996 Act "to open all telecommunications markets to competition," Preamble, 110 Stat. 56, including those served by ISPs, so that all Americans could have access to a wide variety of services at lower prices from numerous providers. To preserve the affordability of telecommunications services, Congress codified the requirement that all providers of telecommunications services contribute to the funding mechanisms that support universal service. § 254(d). Congress also defined several new terms to help achieve the Act's goals. Under § 153(43), "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." In § 153(46), a "telecommunications service" is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public," "regardless of the facilities used." "Information services" are defined under § 153(20) of the Act in pertinent part as services that offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." In § 153(44), "'a telecommunications carrier' means any provider of telecommunications services" but such carrier "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services."

The Act's distinction between "telecommunications services" and "information services" derives from the distinction between "basic services" and "enhanced services" under what is known as the FCC's "Computer II"

regulatory framework,[5] and later incorporated into the Modification of Final Judgment which settled the break-up of AT&T. *See In re Federal-State Joint Bd. on Universal Serv., Report to Congress*, 13 F.C.C.R. 11,501, 11,511, ¶ 21 (1998) (*"Universal Service Report"*) ("Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon the frameworks established prior to the passage of the 1996 Act"). Under the Computer II framework, the FCC distinguished between "basic" transmission services, a class of services subject to common carrier regulation under Title II of the Act, and "enhanced" or "information" services, a class of services not subject to Title II, that are provided over basic transmission services. *In re Amend. of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C. 2d at 420. Sections 201 and 202 of Title II require those who offer common carrier services to provide them upon reasonable request, and on nondiscriminatory terms. Since Computer II, the FCC has consistently regulated a telecommunications carrier's basic transmission service as common carriage even when bundled for sale with information services. FCC Br. 35.

Computer II's regulatory framework spawned an explosive growth of new and innovative computer-based information services introduced by new competitive entrants into the information services market. *Universal Serv. Report*, 13 F.C.C.R. at 11,546, ¶ 95. Telephone companies in turn began to develop and perfect high-speed DSL transmission services to support the delivery to

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[5] *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C. 2d 384, 417 (1980), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

customers of Internet-based information services offered by both the telephone companies and competitive ISPs. The ultimate beneficiaries of this regulatory framework have been consumers, with greater access to a wider choice of information services at lower prices.

During this time, cable television operators also expanded their service offerings, and began providing common carrier voice (telephone) service to end-use customers over the physical facilities used to deliver their TV service. Pet. App. 101a. In recognition of that fact, Congress provided in the Cable Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), that to the extent that cable companies offered common carrier services, they would be treated as common carriers just like the telephone companies. § 541(d)(1) & (2). Congress made clear that services were to be distinguished on the basis of function, and not on the types of facilities used or technology deployed to provide them. H.R. Rep. No. 98-934, 1984 WL 37495, at 43 (Aug. 1, 1984).

Congress enacted the 1996 Act against this regulatory, judicial and legislative backdrop: It incorporated the distinction between basic transmission and information services (*see* §§ 153(46), 153(20)); it retained and built upon the framework that barred carriers from discriminating against their information service competitors in providing telecommunications services (*see, e.g.*, §§ 260(a)(2), 275(b)(1)); it maintained technological neutrality, distinguishing services based only upon function and not by the types of facilities or technology used (*see* §§ 153(46), 706(a)); and it sought to promote by "regulating methods," including "regulatory forbearance," affordable access by all Americans to the high-speed services necessary to connect to

advanced services available on the Internet (*see* §§ 254(b)(2), (3), (6), 706(a)).

c. *AT&T Corp. v. City of Portland.* Nearly five years ago, in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), the Ninth Circuit held that, under the 1996 Act, the high-speed cable line that comprises the telecommunications component of cable modem service is a telecommunications service as defined in § 153(46). The court said:

> Like other ISPs, [AT&T's cable broadband service] consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, [the cable broadband provider] controls all of the transmission facilities between its subscribers and the Internet. To the extent [a cable broadband provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing telecommunications service as defined in the Communications Act.

Pet. App. 15a (brackets and parentheses in orig.).

In reaching this conclusion, the court considered the Act's technological neutrality, the FCC's classification of functionally similar DSL service as a telecommunications service, and the Act's purpose in promoting "vigorous competition" among providers that "prioritizes consumer choice" by mandating a network architecture embodied by the "dual duties of nondiscrimination and interconnection." *Portland*, 216 F.3d at 879. The court, however, did not require the FCC to regulate the telecommunications service component of cable modem service under Title II,

but properly concluded that this policy matter was for the FCC alone to decide pursuant to the agency's regulatory forbearance authority in § 160. *Id.* at 879-80.

No party sought review of *Portland*.

d. The FCC's Declaratory Ruling. Two years after *Portland*, in direct conflict with that decision, the FCC declared that cable modem service, when offered to the public for a fee, is solely an information service, and does not contain a telecommunications transmission service component within the meaning of § 153(46) subject to Title II and Computer II. Pet. App. 94a-96a. Ignoring the Act's requirement of technological neutrality, and relying on the historical happenstance of the way connecting to the Internet had evolved, the FCC observed that Computer II's obligations of nondiscriminatory access to company-controlled transmission services "have been applied exclusively to traditional wireline services and facilities," that the "*telephone network* is the primary, if not exclusive means" by which ISPs can access their customers, and that the FCC had "never . . . applied Computer II to information services provided over cable facilities." Pet. App. 100a-101a (emphasis in orig.). The FCC thus declared that only facilities-based (*i.e.*, those that own or control transmission facilities) *telephone* companies, but not facilities-based *cable* companies, must provide the Internet connection pipeline underlying their information services on a common carrier basis. Pet. App. 101a-102a.

The FCC acknowledged that cable modem service does in fact contain a functionally discrete telecommunications transmission component that, if offered on a stand-alone basis, would qualify as a telecommunications service within the meaning of § 153(46). Pet. App. 97a. The FCC, however, contended that when a cable operator chooses to

bundle the transmission component with information services for sale to the public, the transmission component ceases to be a legally separate service. At the same time, the FCC admitted that the customer is not compelled to use the bundled services package, and could completely bypass the cable operator's ISP services by "clicking through" and separately utilizing the transmission path to reach another ISP. The FCC, however, acknowledged that, in such a case, the customer would be forced to pay an additional fee over and above the monthly charge for cable modem service, and thus pay twice for ISP-type services. Pet. App. 57a-58a.

Simultaneous with the issuance of its ruling, the FCC initiated a further proceeding in which, among other things, it is considering whether to forbear under § 160 from regulating the telecommunications service component of cable modem service in light of *Portland's* holding. Pet. App. 151a-152a. The FCC has yet to act. The FCC is also currently considering whether to reclassify DSL service as solely an information service. *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019 (2002).

Commissioner Copps dissented from the Declaratory Ruling, stating that it was inconceivable "that Congress intended to remove from its statutory framework core communications services," such as cable broadband transmission service, or that Congress "envisioned its statutory handiwork being made obsolete by a new service offering." Pet. App. 199a. In particular, he criticized the FCC's refusal "with scant analysis" to apply its own rules in Computer II that "ha[ve] been key to the development of

a competitive information services market." Pet. App. 200a.

e. ***Brand X Internet Servs. v. FCC.*** In a per curiam opinion, the Ninth Circuit vacated the FCC's ruling that classified cable modem service as wholly an information service under the Act. After concluding that the "regulatory classification of broadband service [was] an essential element of our decision" in *Portland*, Pet. App. 16a, the court adhered to that decision, citing the law of its circuit and applying this Court's decision in *Neal v. United States*, 516 U.S. 284 (1996). Pet. App. 17a-21a. Judges O'Scannlain and Thomas each filed concurring opinions. Judge O'Scannlain expressed uneasiness that stare decisis bound the panel to its precedent, although he noted that an en banc panel could overrule the court's prior decisions. Pet. App. 23a. Judge Thomas, who authored the *Portland* decision, stated that "even if we were writing on a clean slate," he would have reached the same result. Pet. App. 39a.

The FCC and the cable association thereafter sought rehearing en banc before the Ninth Circuit. The court, however, chose not to revisit *Portland*, and declined to grant en banc review, with no active judge on the Ninth Circuit requesting a vote on whether to rehear the case en banc. Pet. App. 207a. These petitions for writs of certiorari followed.

SUMMARY OF ARGUMENT

Everyone agrees that if cable companies sold high-speed Internet pipelines to consumers as a stand-alone product – without including various information services, such as e-mail – such a product must be classified as a telecommunications service under § 153(46), subject to the

regulatory provisions of Title II of the Act. The "problem" in this case, according to the FCC, is that cable companies have chosen not to offer the high-speed Internet pipeline as a stand-alone product, but instead compel consumers to purchase the pipeline along with information services, like e-mail, as a "bundled service" that the FCC calls cable modem service. The FCC interprets the Act to conclude that the bundled service is solely an information service with no legally distinct telecommunications service component.

The FCC's classification of cable modem service as lacking a legally cognizable telecommunications service depends entirely on this "bundling" theory. The FCC contends that because the statute does not explicitly tell it how to classify such "bundled" services, the FCC is free to conclude – as it did in the Declaratory Ruling – that when the high-speed pipeline becomes part of a bundled package, the Internet connectivity component of cable modem service loses its legal character as a telecommunications service, and the FCC may thus permissibly classify the packaged offering as solely an information service. *See* FCC Br. 26. This interpretation exceeds the bounds of reason.

First, nothing in the plain text of the Act's definitions and their legislative history supports the FCC's view that bundling makes any difference at all to the legal status of high-speed Internet pipelines. Cable modem service is no more and no less than a telecommunications service (the Internet pipeline) packaged for sale with one or more information services. The Act does not permit the FCC to deem legally non-existent a telecommunications service just because a cable company forces consumers to buy it with some information service.

Second, to the extent that the statutory definitions, viewed in isolation, are not perfectly clear, they become so when viewed in the context of the Act's other provisions, its purposes, and its history. The FCC's bundling theory supporting its statutory interpretation cannot stand because it takes regulatory decisions out of the FCC's hands, and indeed, out of Congress' hands, and puts them solely into the hands of the cable companies' marketing departments. Indeed, because the FCC's bundling theory applies equally to cable modem service and to DSL service, and even to old-fashioned dial-up service, the FCC's interpretation, if adopted, would put all regulatory decisions about telecommunications services into the hands of corporations, not the FCC. Any company that offers telecommunications services – from voice telephone service to DSL service and so forth – could simply evade all regulation by selling that service bundled with some information service, such as voice mail.

Most significantly, the FCC's statutory interpretation thwarts the goal of universal service – nationwide, affordable telecommunications service – that is one of the central objectives of the 1996 Act. Through the Act, Congress sought to achieve universal service in two principal ways: (1) by maintaining nondiscriminatory access to telecommunications services to spur competition among numerous providers of services, leading to lower prices for consumers; and (2) by prescribing funding mechanisms to subsidize telecommunications service to those customers living in rural and underserved areas where competition is less likely to develop. The FCC's statutory interpretation, based on its bundling theory, ignores Congress' prescription to promote universal service by impermissibly exempting cable modem providers from the Act's provisions requiring nondiscriminatory access to telecommunications

services, and the subsidy of such services in rural and underserved areas.

To be sure, Congress recognized that competition sometimes works better than regulation; however, Congress balanced that presumption with provisions in the Act that permit the FCC to forbear from regulating certain services, provided that the FCC follows the carefully-prescribed procedures mandated by Congress in § 160. The FCC's interpretation of the statute bypasses this detailed, congressionally-mandated scheme, and says – in so many words – that the decision whether to be regulated is no longer Congress' or even the FCC's. That determination, based on the FCC's interpretation, now lies solely with every telecommunications company's marketing department, by the simple expedient of taking what everyone agrees is a telecommunications service, and marketing it together in a single package with an information service.

The Communications Act, read as a whole and in light of Congress' clear purposes, does not permit such a result. The FCC's interpretation of the statute is patently at odds with Congress' intent, and is unreasonable. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. THE FCC FAILS TO RECOGNIZE THAT THIS CASE CONCERNS THE "PIPELINE" THAT CONNECTS CONSUMERS TO THEIR ISP, ALLOWING THEM ACCESS TO THE INTERNET

As an initial matter, it is important to clarify that at issue here is the last-mile connection, or pipeline, that connects a customer to an ISP, and whether that pipeline qualifies as a "telecommunications service" under § 153(46) of the Act. No one disputes that when the telephone

company offers a dial-up telephone pipeline to connect the customer to an ISP, the Act classifies that pipeline as a "telecommunications service." And historically, when the telephone company leases a high-speed (DSL) telephone pipeline to an ISP, which then connects the line to its customers, the FCC always has classified that pipeline as a "telecommunications service." Similarly, when the telephone company acts as its own ISP – that is, when it provides customers with information services like an e-mail account, a personal web page, and data retrieval – the FCC historically has classified the underlying DSL pipeline as a "telecommunications service," even though the pipeline is sold together with information services. *See In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,011, 24,030, ¶ 36 (1998) (an "end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately" under the Act) (citations omitted).

Critically, in each and every case, when someone wants to get onto the Internet, some entity must offer to the customer a pipeline that connects the customer's home to an ISP. In the case of dial-up or DSL service, that entity is the telephone company that controls this last-mile connection, and that pipeline is classified as a telecommunications service under the Act. At issue here is whether this same sort of pipeline – when offered to the public by a cable company – may be treated differently under the Act.

The sometimes confusing terminology that has been applied in the past can obscure this basic distinction between the last-mile Internet connection (the pipeline) and the information services that are "on" the Internet. Thus, for example, in its brief the FCC spills a lot of ink

trying to explain how the Act's definition of "information service" pertains to the classification of the "Internet access services" offered by ISPs described in its Universal Service Report to Congress, and why that discussion supports the FCC's interpretation of the Act. *See, e.g.*, FCC Br. 6-7. But the Internet-based "access" services discussed there are those offered by "traditional" ISPs – *i.e.*, those that do not control the last-mile transmission pipeline to the customer. *Universal Serv. Report*, 13 F.C.C.R. at 11,540, ¶ 81; FCC Br. 7. As the FCC explained, in those cases, end-users must first obtain a "'telecommunications service' from local exchange carriers" – *e.g.*, a dial-up telephone service connection – and "then use information services provided by their Internet service provider" to access a site like Expedia. 13 F.C.C.R. at 11,572, ¶ 145. The FCC thus made clear that the services provided by the ISPs discussed in the report do not include this last-mile "telecommunications service" connection; the services they provide are concededly information services and are not at issue here. The service at issue here – the high-speed cable pipeline offered by cable operators to connect a customer to an ISP – is one that the FCC expressly declined to classify in that report. *Id.* at 11,535, n.140.

II. THE FCC'S INTERPRETATION OF THE STATUTE IS WHOLLY INCONSISTENT WITH THE STATUTE'S TERMS, HISTORY, AND PURPOSE

The question presented here is how, under the 1996 Act, Congress intended to classify the high-speed cable pipeline described above. The FCC insists that its interpretation of the statute deserves deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The FCC's interpretation, however, is entitled to *Chevron* deference

(a) only if the statute does not speak directly to the issue, and then (b) only if the FCC's interpretation is reasonable. *Id.* at 842-43. The FCC cannot clear either hurdle. As the Ninth Circuit concluded in *Portland*, the statute is clear.[6] But even if it were not, the statute is not susceptible to the FCC's interpretation.

A. The Act's Definitions Themselves Foreclose the FCC's Interpretation

The FCC's statutory analysis starts, and largely ends, with its parsing of three definitions. In § 153(20), Congress defined an "information service" as the "offering of a capability for . . . making available information via telecommunications." "Telecommunications" in turn is defined in § 153(43) as "the transmission . . . of information of the user's choosing," "between or among points specified by the user," "without change in the [information's] form or content." When "telecommunications" is "offer[ed] for a fee directly to the public or to such classes of users as to be effectively available directly to the public," it is a "telecommunications service" "regardless of the facilities used." § 153(46).

The FCC painstakingly strains to avoid classifying the telecommunications component of cable modem service as a telecommunications service by focusing on the fact that cable operators choose to sell a bundled package of services: high-speed internet connectivity (the pipeline) along with various Internet-based information services (such as

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[6] The Ninth Circuit in the decision below thus properly adhered to its decision in *Portland* because *Portland* correctly construed the statute. Respondents, however, agree that this Court is not bound by that ruling.

e-mail, or a personal web page). On this basis, the FCC argues principally that because of this "bundling," the cable operator does not "offer" the high-speed cable pipeline as a "telecommunications service" within the meaning of § 153(46), because it does not provide it on a "stand-alone" basis, separate and apart from its offer of information services. Pet. App. 97a; *see also id.* 96a (cable operator does not "offer" the high-speed cable pipeline because it is "part and parcel" of its offer of information services). At the same time, the FCC contends, such bundled service fits nicely within the Act's definition of an information service in § 153(20), because that provision uses the words "telecommunications" and "information service" in the same definition. Thus, the FCC concludes, cable modem service is solely an information service under the Act.

Putting aside that the Act's definitions must be construed "in their context and with a view to their place in the overall statutory scheme," *see Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989), the Act's definitions and their legislative history, even when viewed in isolation, demonstrate that the FCC's interpretation is simply not reasonable.

a. Fundamentally, the Act does not support the FCC's view that cable modem service lacks a separate, legally cognizable telecommunications service component that must be classified as such under § 156(46). Nothing in the Act's definitions requires, or even suggests, that a high-speed cable pipeline must be offered or priced separately from information services to qualify as a "telecommunications service." Section 156(46) says only that when telecommunications capability is "offer[ed] for a fee directly to the public or to such classes of users as to be

effectively available directly to the public," it is a telecommunications service. On its face, the definition applies whether the offer or fee is for a stand-alone service or part of a bundled package. The FCC, of course, is not free to insert words into a statute that Congress did not supply. *See United States v. Calamaro*, 354 U.S. 351, 359 (1957).

More importantly, the statute's purported silence regarding how to classify "cable modem service," on which the FCC places so much weight, is illusory. It is undisputed that the cable pipeline, when sold on a stand-alone basis, is a telecommunications service within the plain meaning of § 153(46):

> To be sure, if a cable modem service provider made a "stand-alone offering of transmission for a fee directly to the public," Pet. App. 97a, such that subscribers could pay for and use the transmission without the information service capabilities that go along with Internet access service, then such a provider might well be "offering" telecommunications and thus providing a telecommunications service.

FCC Br. 24. Nothing in the Act dictates a different conclusion just because a company's marketing department chooses to sell that pipeline with various information services to the public at a single price. The Act already clearly specifies how to classify an Internet connection, like the high-speed pipeline that is a component of cable modem service. And the Act already clearly specifies how to classify Internet-based services, such as e-mail, that is the other component of cable modem service. The Act, in short, already completely dictates how to classify everything that the FCC calls cable modem service.

The Act does not speak to the status of so-called "hybrid" services like those described by the FCC (*see, e.g.*,

FCC Br. 6), because there is no such thing. Cable modem service is just a package of legally discrete services marketed together to the public. Any "gap" in the definitions that the FCC claims discretion to fill is of the FCC's own creation, because nothing in the Act requires – or even permits – the FCC to view the components of a "hybrid" service as anything other than having legally discrete components, and to evaluate their appropriate classifications individually.[7] The FCC may have discretion under *Chevron* to resolve ambiguities, but it does not have discretion to create them as a means of expanding its authority by making new law.

The Act, in fact, reflects Congress' understanding that services might be marketed together without altering their individual legal statuses. In § 153(44), the Act defines a "telecommunications carrier" as "any provider of telecommunications services," and specifies that Title II's requirements apply "*only to the extent* that [the provider] is engaged in providing telecommunications services." (emphasis added.) This language clearly demonstrates that Congress necessarily contemplated that companies may bundle both telecommunications services and information

[7] Two facts about cable modem service illustrate this point. First, as discussed below, although cable companies require consumers to buy a bundled package, consumers need not avail themselves at all of the cable companies' information services to use the Internet. Instead, they can bypass the cable companies' e-mail, home page, etc. entirely, and "click through" to use those services as provided by someone else. *See infra* at 21-22. Second, there is nothing that technically prevents the cable company from unbundling these services, and indeed, the FCC has forced DSL providers to do exactly that. The contention that the cable modem service somehow inextricably intertwines the two services, Cable Ind. Br. 23, is patently false.

services for sale to consumers. Pet. App. 32a-33a. "To the extent that" a cable company chooses to market two legally discrete services as a package for a single price, that marketing tactic does not affect the legal status of either service.[8] A telecommunications pipeline remains a "telecommunications service" under § 153(46) whether or not it is bundled with an information service like e-mail or a personal web page.

Indeed, the FCC's interpretation yields the absurd result – which Congress could not have intended – that companies could bundle themselves out of regulation. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) (statute should be read to avoid absurd results when another reading is consistent with its words and purpose). On the basis of the FCC's interpretation, any company offering, or planning to offer, a high-speed Internet pipeline to the public (or any other telecommunications service), could exempt itself from regulation by the simple expedient of marketing that service together with voice mail, e-mail, or some other information service. Even dial-up telephone service could, on the FCC's theory, cease to exist as a telecommunications service if the telephone company chose to sell voice mail service bundled with the telephone pipeline.

The FCC's claim that the telecommunications transmission component of cable modem service is "part and parcel" of the information services component not only

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[8] When one considers the definition of "telecommunications carrier" in § 153(44), which the FCC virtually ignores, together with the Act's definitions of "telecommunications service" in § 153(46), "telecommunications" in § 153(43), and "information service" in § 153(20), it becomes evident that Congress had no need to speak to the status of a so-called "hybrid" service, like cable modem service, because such a hybrid service is a fiction.

fails as a matter of law, it is not even correct as a matter of actual practice. As the FCC itself concedes, a subscriber can bypass the cable operator's ISP, and "click through" to reach the ISP of his choice. Pet. App. 57a-58a. In that circumstance, the subscriber bypasses the e-mail account, the personal web page, and the like offered by the cable operator, and instead uses only the "transparent, unenhanced transmission path" – a path that the FCC previously has classified as a "telecommunications service" – to reach his chosen ISP. *In re Deployment of Wireline Services Offering Advanced Telecomms. Capability*, 13 F.C.C.R. at 24,030, ¶ 36. The subscriber, however, is compelled to pay a monthly fee directly to the cable company for the cable operator's information services that the subscriber does not use. Other than a customer's desire to avoid paying twice for ISP-type services, there is nothing that technically precludes a customer from using the cable operator's high-speed pipeline to connect to another ISP. That indisputable fact undermines any notion that the pipeline is "integral" to the cable operator's information services.

The FCC's classification here of a high-speed transmission pipeline as part and parcel of the information services with which the pipeline is bundled for sale is not even consistent with its own application of the statute in similar contexts. The FCC long ago repudiated the notion that a telephone company could escape regulation of its telecommunications transmission service as common carriage under Title II simply by packaging such service with information services for public sale. *In re Filing and Review of Open Network Architecture Plans*, 4 F.C.C.R. 1, 141, ¶ 274 (1988). As the FCC repeatedly has explained, a telecommunications service does not lose its character as such because it is marketed with information services. *See*

id.; *In re Independent Data Communs. Mfrs. Ass'n, Inc.*, 10 F.C.C.R. 13,717, 13,722-723, ¶¶ 44-45 (1995); *Universal Serv. Report*, 13 F.C.C.R. at 11,530, ¶ 60. The FCC has also uniformly stated, consistent with § 153(44), that to the extent that a telephone carrier simultaneously offers high-speed transmission bundled with information services, the high-speed transmission nonetheless retains its status as a common carrier service that must be offered on nondiscriminatory and reasonable terms to competing ISPs. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. at 24,030-31, ¶ 37 (even if DSL service is offered with information services, DSL service remains a telecommunications service that telephone carriers are compelled to offer to competing ISPs). Moreover, contrary to its litigation position here, *see* FCC Br. 24, the FCC previously has acknowledged that from the customer's perspective, Internet access might look like one service, but the statutory definitions of the 1996 Act required the FCC to classify the two services separately: "the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access." *Id.* at 24,030, ¶ 36. Given the FCC's apparent inability to apply the statute consistently, the FCC undermines any claim for deference under *Chevron* to its statutory interpretation here. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." (citation and quotation omitted)).

b. Notwithstanding the above, to make its bundling theory work – *i.e.*, a telecommunications service if sold to the public on a stand-alone basis ceases to exist as a

legally cognizable service when packaged for sale with information services – the FCC has seized upon the phrase "via telecommunications" within § 153(20). It contends that because the definition of "information service" includes references to both an information service and to telecommunications, whereas the definition of "telecommunications service" lacks any reference to information service, categorizing cable modem service – which has both components – as an information service is at least reasonable. FCC Br. 26. The contention is without merit. The inclusion of the phrase "via telecommunications" in § 153(20) does not suggest a congressional intent that "hybrid" services, as the FCC calls cable modem service, are classified as solely an information service. The phrase simply defines "information services" as those that require "telecommunications" or transmission by means of the electromagnetic medium for their delivery, as distinguished from information services that use other media and are beyond the scope of the Communications Act. *See* H.R. Rep. No. 104-204, 1995 WL 442504, at 125-26 (July 24, 1995) (confirming the term "telecommunications" relates to the type of transmission medium underlying the provision of information services). For example, absent the "via telecommunications" clause in the statute, a legal research service that stores, retrieves, organizes and provides to customers binders containing the legislative histories of specific statutes would qualify as an "information service" because it is a service "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." § 153(20). Similarly, absent the "via telecommunications" clause, all public library services would fall within the ambit of § 153(20). Obviously, these services are not subject to the Communications Act.

The FCC has construed the term "telecommunications" in the same way in order to carefully confine its authority to activities within its jurisdiction. *See Universal Serv. Report*, 13 F.C.C.R. at 11,549, ¶ 99 (explaining that overnight letter delivery service in lieu of a telephone call to convey a message not subject to the Act's universal service funding requirements because such service is not "telecommunications.")

The Act's legislative history further confirms that "'telecommunications service' was distinguished from 'telecommunications' largely in order to exclude internal, privately provided telecommunications networks." Pet. App. 36a (discussing H.R. Rep. No. 104-204, 1995 WL 442504, at 126 (July 24, 1995)). A bank, for instance, might use a private network to connect to its various branches. Cable operators offering high-speed pipelines together with information services are not like banks because they do not use private networks. They offer their services indiscriminately to the public for a fee by interconnecting with the public network.[9]

Additional legislative history clarifies Congress' intent to classify the transmission component underlying Internet services as a telecommunications service as a necessary condition to preserve and advance universal service. The Senate Report explained that:

> As defined under the 1934 Act (as amended by this bill), "telecommunications services" includes

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[9] Indeed, contrary to the FCC's claim, FCC Br. 38, the distinction between private and common carriage is not relevant to whether cable modem service is subject to regulation. *See* § 541(d)(2) (cable operator that provides any communication service other than cable service "whether offered on a common carrier or *private contract basis*" may be regulated) (emphasis added).

> the transport of information or cable services, but not the offering of those services. This means that information or cable services are not included in the definition of universal service; what is included is that level of telecommunications services that the FCC determines should be provided at an affordable rate to allow all Americans *access* to information, cable and advanced telecommunications services that are an increasing part of daily life in modern America.

S. Rep. No. 104-23, 1995 WL 142161, at 27 (Mar. 30, 1995) (emphasis in orig.).[10]

The FCC contends that Congress' failure to adopt the Senate's language that defines "telecommunications service" to include the transmission of information services supports its statutory interpretation, FCC Br. 27 n.9, but in omitting the reason why the Senate's language was deleted, the FCC's contention falls apart. When concerns were raised about the states' ability in § 254 to preserve universal service for the transmission of information services, one of the bill's sponsors explained that the Senate's language was deleted simply "to clarify that the carriers of broadcast and cable services are not intended to be classified as common carriers under the Communications Act to the extent that they provide broadcast services or cable services." 141 Cong. Rec. S7996 (1995) (statement of Sen. Pressler). The FCC agreed. *See Universal Serv.*

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[10] *See also* S. Rep. No. 104-23 at 18 (definition of "telecommunications" intended to exclude "those services, such as interactive games or shopping services and other services involving interaction with stored information, that are defined as information services." However, "[t]he underlying transport and switching capabilities on which these interactive services are based . . . are included in the definition of "telecommunications services.").

Report, 13 F.C.C.R. at 11,523, ¶ 44. The service at issue here has nothing to do with broadcast or cable services.

In the end, the FCC's statutory argument boils down, in the FCC's own words, to this:

> Given that the Act's definition of "information service" expressly contemplates a "telecommunications" component, whereas the definition of "telecommunications service" does not similarly contemplate an information service component, the regulatory necessity of placing "offering[s]" in one mutually exclusive category or the other amply justifies the FCC's decision to place "mixed" or "hybrid" services like cable modem service on the information services side of the line.

FCC Br. 26.

The FCC's rationale is wholly without merit. As discussed above, the FCC's attempt to create a "hybrid" service derived from a cable company's marketing strategy that requires its own legal classification is contrary to the statute. And the FCC's claim that such a legally distinct "hybrid service" as "cable modem service" even exists is refuted by the statute's legislative history explaining the intent of the phrase "via telecommunications" in the definition of "information service."

B. The FCC's Interpretation Conflicts with the Act's Purposes and the Methods by Which Congress Sought to Achieve Them

Even if the FCC is correct that the Act's definitions are ambiguous, based solely on examining their language, the FCC's interpretation is nonetheless not reasonable, and not entitled to deference. A "statute is to be read as a whole," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), and a "provision that may seem ambiguous in

isolation is often clarified by the remainder of the statutory scheme," *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 467 (2004) (citations and internal quotations omitted). *See also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context") (citation omitted). Here, any residual ambiguity that the FCC might claim to support its plea for deference disappears when one looks not just to the definitions at issue, but to the Act as a whole, and its history and purposes. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (declining to afford *Chevron* deference to agency's interpretation of statute where that interpretation was precluded by examination of the "text, structure, purpose, and history" of the statute in question).

1. The FCC's interpretation conflicts with Congress' goals

This is not a case where parties merely disagree with the means the agency has chosen to achieve congressionally-mandated goals. This is a case where the agency effectively has ignored those goals, and refused to comply with the means Congress chose to achieve them.

Fundamentally, the FCC's statutory construction chisels out of the Act its cornerstone: universal access by all Americans to high-speed Internet connections. And by classifying cable modem service as it has, the FCC impermissibly has refused to comply with the methods which Congress specified for achieving the Act's universal service goals. The Act reflects Congress' presumption that universal service will be achieved by nondiscriminatory access to telecommunications services that will spur competition among numerous providers, leading to lower prices for

consumers. *See* H.R. Rep. No. 104-204, 1995 WL 442504, at 47-48 (July 24, 1995). At the same time, the Act presumes that funding mechanisms are necessary to ensure universal telecommunications service to customers living in rural and underserved areas, where competition is not likely to exist or be robust. § 254(d). The FCC's statutory interpretation reads these presumptions, and the specific provisions designed to realize them, out of the Act. *Cf. Universal Serv. Report*, 13 F.C.C.R. at 11,504, ¶ 4 ("rules should not create anomalies or loopholes that can be exploited by those seeking to avoid universal service obligations").

a. In the 1996 Act, Congress sought to expand access by consumers and competitors alike to the high-speed pipelines that connect consumers to the Internet. As one Senator put it, "for consumers and competitors, the open access requirements will do for telecommunications what the Interstate Highway System has done for the shipment of tangible goods and the movement of people and ensure that all competitors will have a way to deliver goods and services to anyone anywhere on the information superhighway." 141 Cong. Rec. S7907 (1995) (statement of Sen. Lott). The FCC's classification of cable modem service, one of these pipelines, as solely an information service is inconsistent with this central objective.

"[O]ne of the fundamental concerns" of the 1996 Act is "[t]he need to protect and advance universal service," S. Rep. No. 104-23, 1995 WL 142161, at 4 (Mar. 30, 1995), to ensure that "no one is barred from benefiting from the power of the Information Age," H.R. Conf. Rep. 104-458, 1996 WL 46795, at 133 (Jan. 31, 1996). Congress thus sought to promote a "pro-competitive, deregulatory national framework," *id.* at 1, that simultaneously promotes ubiquitous and affordable access to advanced technologies

to enable all Americans to connect to the Internet.[11] In order to open up markets to new entrants, Congress retained and built upon the core nondiscrimination and interconnectivity requirements of Title II set forth in §§ 201 and 202. These provisions require a carrier to offer telecommunications service on nondiscriminatory and reasonable terms. The obligations in Title II thus permit the carrier's competitors to access network transmission services necessary to reach their customers. *See* H.R. Rep. No. 104-204, 1995 WL 442504, at 71 (July 24, 1995) ("interconnection requirement in section 201(a) is a cornerstone principle of common carriage, and it is restated here . . . as the local telephone industry undergoes the transition to a competitive market.").

Congress also enacted specific provisions strengthening the Act's universal service policy goal, *see* § 151, to ensure that no one was left out of the "information age." Congress defined universal service broadly

> to ensure that the *conduit*, whether it is a twisted pair wire, coaxial cable, fiber optic cable, wireless, or satellite system, *has sufficient capacity and technological capability to enable consumers* to use whatever consumer goods

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[11] "This comprehensive bill strikes a balance between competition and regulation." 141 Cong. Rec. S7896 (1995) (statement of Sen. Hollings). "[T]his bill is also responsibly deregulatory. When it comes to maintaining universal access to telecommunications services, for instance, it does that. It establishes a process that will make sure that rural and small-town America doesn't get left in the lurch. This bill also maintains significant Federal oversight. Telecommunications, remember, isn't like trucking, or railroads or airline transportation. . . . [D]eregulation is always a gradual, transitional process. . . . " 141 Cong. Rec. S7889 (1995) (statement of Sen. Pressler).

> that they have purchased, such as a telephone, personal computer, video player, or television, *to interconnect to services that are available over the telecommunications network.* The Committee does not intend the definition of universal service to include the purchase of equipment, such as a computer or telephone, that is owned by the consumer and is not integral to the telecommunications service itself.

S. Rep. No. 104-23, 1995 WL 142161, at 27 (Mar. 30, 1995) (emphasis added).

To preserve universal service, Congress codified the requirement that all providers of "telecommunications services" support federal universal service funding mechanisms. § 254(d), (f); S. Rep. No. 104-23, 1995 WL 142161, at 4 (Mar. 30, 1995). To advance universal service, Congress specifically mandated that telecommunications carriers make high-speed connections available and affordable to consumers in high-cost and rural areas, to school children and libraries, and to rural health clinics so that they can access the advanced services on the Internet. § 254(b)(2), (3) & (6), 254(h)(1)(A) & (B), 254(h)(2); H.R. Conf. Rep. No. 104-458, 1996 WL 46795, at 132 (Jan. 31, 1996). In § 255(c), Congress additionally required providers of "telecommunications services" to ensure that advanced services are accessible to individuals with disabilities. And in § 706(a), Congress reinforced its intent that all Americans, and in particular school children, have access to the advanced capability, regardless of technology, needed to connect to the Internet, and expressly commanded both the FCC and the states to use "regulating

methods" applicable to "telecommunications services" to make that happen.[12]

b. At the same time, to ease potential regulatory burdens and transition to a deregulatory policy framework, Congress in § 160 gave the FCC a powerful new deregulatory tool of forbearance, which the agency previously lacked. *See MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994) ("*MCI v. AT&T*") (overturning FCC's attempt to deregulate by construing statute at odds with congressional intent).[13] With this tool, Congress defined a process by which the FCC could refrain from regulating services that otherwise fall within Title II – such as the high-speed cable pipeline that constitutes the telecommunications service component of cable modem service. Using that process, the FCC may forbear from enforcing a statutory provision if it determines that enforcement of a regulation or provision is "unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest." *Portland*, 216 F.3d at 879.

The statute thus expresses the overriding congressional purpose of promoting universal service, admonishes the FCC to use the same sort of regulating methods it has applied to telecommunications services to further that purpose (*see* § 706(a)), and strikes a balance by allowing

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[12] The FCC has conceded that cable modem service is an advanced capability as defined in § 706(c)(1). Pet. App. 132a.

[13] Section 160 was added to the 1996 Act in direct response to *MCI v. AT&T* to give the FCC specific statutory authority to forbear from Title II regulation. *See* 141 Cong. Rec. S7888 (1995) (statement of Sen. Pressler) ("[Section 160] will make it possible for the FCC immediately to forbear from economically regulating. . . . Federal courts have ruled that the FCC cannot deregulate. This bill solves that problem. . . . ").

the agency to use specific procedures (the forbearance procedures in § 160) where the agency determines that an absence of regulation might better achieve Congress' goals.

c. By classifying the high-speed cable pipeline as an information service based solely on the cable operator's decision to sell it with information services, the FCC's Declaratory Ruling vitiates the statutory scheme and frustrates the Act's objectives. Because much of Title II applies only to "telecommunications carriers," "providers of telecommunications services," or "common carriers," none of Title II's requirements would apply to a cable provider of a high-speed pipeline because, under the FCC's theory, a cable provider does not offer a "telecommunications service" when it chooses to bundle the cable pipeline with information services for public sale under the rubric "cable modem service." And despite the FCC's concession that cable modem service is one of the high-speed capabilities defined in § 706(c)(1), the FCC's interpretation conflicts with Congress' directive in § 706(a) that the FCC use "regulating methods" applicable to "telecommunications services" to promote such capabilities.

It is inconceivable that Congress intended to categorically exempt cable operators, who control over two-thirds of the broadband (high-speed) market, and in some areas is the only residential broadband provider, from all of the Act's provisions that promote competitive and universal access to broadband capability. And it is equally inconceivable that Congress would have permitted cable operators to exempt themselves from these provisions simply by choosing to market their high-speed pipeline together with other services at a single price. The statute, consistent with Congress' purposes, categorically includes cable modem service as one of the high-speed capabilities

subject to Title II, and specifies a carefully defined method – regulatory forbearance under § 160 – whereby the FCC (not the cable operators themselves) can exempt the service from regulation.

d. As the briefs of the telephone company Petitioners make clear, the FCC's bundling theory has no principled stopping point. Because any telecommunications service provider could evade regulation entirely simply by deciding to combine an information service for sale with its telecommunications transmission service, the FCC's interpretation potentially would dismantle Title II, and the universal service goals that underlie it.

This is not the first time that the FCC has attempted to read out core provisions of the Act to effectuate its notion of how to achieve the Act's purposes. In *MCI v. AT&T*, in remarkably similar circumstances, the FCC attempted to do the same thing, but this Court forbade it. In that case, the FCC sought to exempt certain long distance carriers from the tariff-filing requirements of § 203(a),"now that there is greater competition" in the long distance market. 512 U.S. at 233. The FCC construed its authority in § 203(b) to "modify any requirement" in Title II as permitting this action. This Court disagreed, stating that § 203(a) was " 'utterly central' to the administration of the Act," *id.* at 230, that the FCC effected a "fundamental revision of the statute," *id.* at 231, and that the FCC had circumvented the means chosen by Congress to prevent unreasonable and discriminatory charges, *id.* In affirming the judgment below, the Court stated: "For better or worse . . . the Commission's desire to increase competition cannot provide it authority to alter the well-established statutory filed rate requirements." *Id.* at 234 (citation and quotation omitted).

The FCC's statutory construction here is no less radical. As in *MCI*, the FCC has exempted certain providers from the core obligations of Title II, based on interpreting a particular term used in the Act. Similarly, as it did in *MCI*, the FCC asserts here that its interpretation should be adopted because a "hands-off policy" provides a better means to achieve the purposes of the Act. FCC Br. 30. For the same reasons stated in *MCI*, the FCC's construction here cannot stand because it carves out requirements that are central to the Act's administration, and, like the FCC's order in *MCI*, would effectively introduce "a whole new regime of regulation (or of free-market competition)." *MCI v. AT&T*, 512 U.S. at 234. Although that "may well be a better regime" to achieve the Act's purposes, "[that] is not the one that Congress established." *Id.*; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency").

Indeed, the FCC's reading of the Act is even more extravagant than it was in *MCI*. If, in *MCI*, it was "highly unlikely that Congress would leave the determination of whether [long distance carriers] will be entirely, or even substantially, rate-regulated to agency discretion," *MCI v. AT&T*, 512 U.S. at 231, it is exceedingly unlikely that here Congress would have left the decision to deregulate to the cable operators (and potentially all carriers) themselves, based on how they choose to market their services to the public. The FCC's statutory interpretation in this case is all the more remarkable because it evades § 160, the regulatory forbearance provision added by Congress in

direct response to *MCI*.[14] Congress could have chosen to deregulate high-speed services, like cable modem service, altogether. Instead, in § 160 Congress prescribed a specific process with specifically defined criteria by which the FCC could refrain from applying any provision or regulation applicable to the telecommunications service component of cable modem service. In fact, in § 706(a), Congress identified regulatory forbearance as one of the "regulating methods" by which the FCC could promote the deployment of high-speed services, which concededly includes cable modem service. Pet. App. 132a. The FCC is not free to circumvent that process, as it has done here, by interpreting the Act in a way that achieves the same goal.

2. The FCC's claims that its interpretation is consistent with the Act's purposes are without merit

The FCC's attempts to demonstrate that its interpretation of the Act is consistent with the Act's goals are unconvincing. First, the FCC argues that unless its interpretation is adopted, cable operators will be subject to a gamut of regulatory requirements that will stifle the deployment of cable modem service. FCC Br. 30-31. Second, the FCC claims that even though its interpretation categorically exempts cable operators from Title II regulation (as explained above), the FCC nevertheless retains ancillary authority under § 152(a) of Title I to impose some or all of Title II's requirements as "necessary and appropriate" to safeguard consumer interests. The FCC is wrong on both counts.

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[14] *See* note 13 *supra*.

On the first point, the FCC improperly conflates the question of how Congress classified cable modem service under the Act – the issue properly before this Court – with the question of whether cable modem service should be regulated – an issue not before this Court. All of the FCC's arguments about why it thinks cable modem service should not be regulated are beside the point. *MCI v. AT&T*, 512 U.S. at 234 ("A desirable policy cannot alter the meaning of the Federal Communications Act of 1934.")[15] Congress defined a specific process in § 160 by which the FCC may refrain from subjecting the telecommunications service component of cable modem service to any provision or regulation, and the FCC may not dodge that process because it wants to achieve the Act's goals in an easier way.

Moreover, a regulatory scheme under which the FCC would enjoy unfettered discretion to impose or not impose obligations on cable modem providers "as necessary or appropriate," Pet. App. 134a; FCC Br. 12 n.7, vitiates the scheme that Congress actually adopted. In fact, the FCC has it backwards. As discussed, the high-speed cable connection to customers is subject to Title II, and if the agency wishes to refrain from imposing any of Title II's requirements, then it must scrupulously make the determinations required in § 160. This case is thus not – as the

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[15] To be sure, if a statute is ambiguous, *Chevron* allows the FCC to choose among a range of *reasonable* interpretations on the basis of policy because that choice is a political question, *see* 467 U.S. at 865, but policy considerations do not define the range of reasonable interpretations among which the FCC may choose. Thus, the FCC's policy arguments about why cable modem service *should* not be regulated are not relevant to whether the FCC's interpretation is reasonable.

FCC contends – about a court's attempt to substitute its judgment for that of the FCC on how best to achieve the Act's purposes. It is about the FCC's impermissible attempt to substitute its own judgment for that of Congress.

On the FCC's second point, even if, in theory, the FCC could exercise ancillary authority, that authority would not allow the FCC to impose any of Title II's requirements on cable modem providers which, according to the FCC, are not telecommunications carriers. As explained in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 697 (1979), Title I gives the FCC authority only over that which is "reasonably ancillary to the effective performance of [its] various responsibilities" under the Act. Put differently, the FCC must identify specifically delegated powers under the Act to which the agency's authority is ancillary. Title I is not an independent source of regulatory authority. *California v. FCC*, 905 F.2d 1217, 1241 n.36 (9th Cir. 1990).[16] The only possible source of expressly delegated responsibilities here would be Title II, but inasmuch as the FCC has exempted providers of cable modem service from Title II, the FCC can cite no specific responsibility to which its ancillary authority would attach. Without that nexus, the FCC has no authority to impose a Title II obligation on cable modem providers as the FCC sees fit. Pet. App. 145a-150a

[16] The FCC likewise could not rely on either § 154(i) or § 706. *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1334, 1350 (D.C. Cir. 1999) (§ 154(i) only provides FCC with ancillary authority to meet its obligations in other of the Act's provisions); *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. at 24,044, ¶ 69 (§ 706 not an independent source of authority). The policy statements in § 230 are equally unavailing. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) (rejecting FCC's reliance on § 151 policy statement as source of preemptive authority).

(discussing open access requirement). Indeed, in *Midwest Video*, this Court overturned the FCC's similar attempt to impose requirements tantamount to common carriage on broadcasters on the basis of its ancillary authority. *See Midwest Video*, 440 U.S. at 706.

In sum, Congress did not give the FCC unbridled discretion to promote the Act's goal of a "pro-competitive, deregulatory" framework subject to none of the safeguards and none of the regulatory processes that Congress prescribed to achieve that goal. By adopting a statutory interpretation that removes cable providers, and potentially all broadband transmission providers, from the scope of Title II, the FCC negates the Act's core nondiscriminatory access and universal service requirements – the principal means by which Congress sought to expand the range of competitive and affordable service choices available to all Americans. If Congress had believed that deregulation alone would promote the Act's goals, then there would have been no need for Congress to leave most of Title II intact, no need to direct the FCC in § 706(a) to use regulatory methods governing telecommunications services as the means by which to promote broadband capability, and no need to specify a process in § 160 by which to ease common carrier requirements as markets transition to full competition.

C. The FCC's Interpretation Conflicts with Other Provisions of the Act

1. Section 706's promotion of ubiquitous access to high-speed connections

A careful consideration of § 706 – the very provision that Congress included to promote ubiquitous access to high-speed pipelines that connect customers to the Internet – makes clear why the FCC's interpretation is not

reasonable.[17] In § 706(c)(1), Congress defined this access as "advanced telecommunications capability" "without regard to any transmission media or technology." This definition includes cable modem service, as the FCC concedes. Pet. App. 132a. In § 706(a), the portion that the FCC consistently neglects to discuss, Congress defined the particular means by which the FCC should promote high-speed capability. In that section, Congress directed both the FCC and the states "with regulatory jurisdiction over telecommunications services" to use "regulating methods," such as "price cap regulation," "measures that promote competition,"[18] and "regulatory forbearance," to ensure that this advanced capability is affordable and accessible. *See* S. Rep. No. 104-23, 1995 WL 142161, at 51 (Mar. 30, 1995) ("the bill encourages States and the FCC to utilize *regulatory* incentives – and in particular, alternative regulation proceedings – as a means to promote the deployment of broadband capability") (emphasis added).[19] These regulatory methods pertain only to telecommunications services subject to Title II, yet the FCC's classification of cable modem service exempts the service from Title II regulation.

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[17] Section 706 is reproduced at the note to § 157.

[18] Contrary to the suggestion of Petitioners, the phrase "measures that promote competition" is properly understood to refer to "regulatory" measures as well, in light of the specific terms that surround it, all of which are forms of regulation. *See Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("catchall provision" is to be "read as bringing within a statute categories similar in type to those specifically enumerated").

[19] "Alternate forms of regulation" are those that do not include rate of return regulation. S. Rep. No. 104-23, 1995 WL 142161, at 49 (Mar. 30, 1995).

It is simply not a sensible reading of the statute to conclude that in one provision Congress would direct agencies to use their regulatory authority to promote the deployment of high-speed transmission capability to all Americans, and in another provision exempt from regulation an entire class of high-speed transmission services.

2. Section 254's promotion of affordable access to high-speed connections

The FCC's interpretation also conflicts with § 254, in which Congress sought to ensure that all Americans have affordable access to high-speed connections to the Internet. After identifying in § 254(b)(2) universal access to advanced telecommunications and information services as an important principle, Congress in § 254(d) directed that all telecommunications providers offering telecommunications services contribute to funding mechanisms to ensure that such access is affordable. As the FCC has acknowledged, Congress' purpose was to "expand[] the class of entities that must contribute to federal universal service support mechanisms," since prior to the Act, only interexchange carriers were required to contribute. *Universal Serv. Report*, 13 F.C.C.R. at 11,553, ¶ 108.

Yet, the FCC's statutory interpretation has the perverse result of shrinking the base of those required to fund universal service by exempting any entity, including a telephone company offering dial-up service, that simply tacks on an information service for sale with its telecommunications service. Taking the FCC's bundling theory to its logical end, potentially no entity would qualify as a telecommunications carrier offering a telecommunications service. As a result, no entity would be statutorily required to contribute to mechanisms that support

service to low-income, rural, or disabled customers, or to schools, libraries and rural health-care providers.

In an effort to avoid this outcome, the FCC cites text in § 254(d) that allows the FCC to compel other telecommunications providers to contribute to universal service. FCC Br. 4 n.2. Once again, the FCC reads the statute backwards. Congress intended the FCC to *supplement* an expanded base of contributors to universal service funding, not to eliminate the base and then permit the agency, with unfettered discretion, to decide who must contribute. Congress' intent is confirmed by § 254(d)'s legislative history that makes clear its purpose to enable the FCC to require contributions from "private telecommunications providers," described as "those who bypass the public switched telephone network through their own or leased facilities." S. Rep. No. 104-23, 1995 WL 142161, at 28 (Mar. 30, 1995). Congress explained that "[i]n the event that the use of private telecommunications services or networks becomes a significant means of bypassing networks operated by telecommunications carriers, the bill retains the FCC's authority" to require "all telecommunications providers to contribute" – both public and private. *Id.*

Cable modem providers are not private telecommunications providers because they do not bypass the public network. They offer their services indiscriminately to the public by interconnecting with the public network.

3. The statute's mandate regarding technological neutrality

The FCC's interpretation also conflicts with the Act's intent to classify functionally similar services in the same way, regardless of the facilities used or technology deployed.

In recognition of the growing convergence of the cable and telephone industries, Congress was well-aware that cable operators would provide telecommunications services in addition to cable TV services, that these telecommunications services would compete directly with similar services offered by telephone companies, and that such telecommunications services would be subject to Title II. *See* § 541(d)(1); *City of Dallas v. FCC*, 165 F.3d 341, 354 n.13 (5th Cir. 1999) (primary goal of the 1996 Act was to facilitate cable companies becoming telephone companies). For that reason, Congress made the Act technologically neutral so that the Act's provisions apply in the same manner, regardless of whether the service in question is based on dial-up, DSL, cable, or some other technology. § 153(46), § 706(c)(1). The FCC's Declaratory Ruling does not heed Congress' directive. Its classification of cable modem service deviates from the agency's classification of other Internet connection services, like DSL service, that are distinguishable only by their differing technologies. *In re Deployment of Wireline Servs. Offering Advanced Telecommunications Capability,* 13 F.C.C.R. at 24,030, ¶ 36.

The FCC searches in vain for a rationale for distinguishing cable modem service providers from other providers of high-speed Internet service, but none has merit. First, the FCC attempts to rationalize why cable modem service deserves differential treatment by arguing that cable operators "have not historically been viewed as common carriers." FCC Br. 17. The FCC hangs its hat on a similar historical argument elsewhere in contending that cable modem service is exempt from the Computer II framework because that framework has been applied "exclusively to traditional wireline services and facilities." Pet. App. 100a, 102a. That the history may be this way, however, does nothing to render reasonable the FCC's

statutory interpretation, especially when one considers that the reason for that historical anomaly is merely the FCC's consistent refusal to address the legal status of cable modem service until this case.

Second, and related, the FCC argues that cable operators – unlike telephone carriers – are not common carriers because they offer their high-speed services over cable, not telephone, facilities. Pet. App. 100a, 102a. The FCC, however, neglects to mention that many cable companies currently offer, as certificated common carriers, voice transmission services over these same cable facilities. Pet. App. 101a-102a. In any event, the character of the facilities over which cable operators provide their service is irrelevant. As the Act makes clear, an entity is a common carrier because it "offers telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public" §§ 153(44) & (46). Cable operators do just that – they offer their high-speed cable pipeline to the public for a fee. That offering constitutes a "telecommunications service" under § 153(46), just as the offering of the DSL pipeline constitutes a "telecommunications service." The FCC does not have "unfettered discretion . . . to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve." *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976).

Third, the FCC argues that telephone companies historically differ from cable companies because the FCC has compelled telephone companies to offer their high-speed DSL service on a stand-alone basis even if it is bundled with information services. Pet. App. 102a; *see In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 F.C.C.R. 7418, 7444, ¶¶ 44 & 46

(2001). That fact, however, derives merely from the historical anomaly that telephone companies have existed for a long time, and started out when there was no Internet. It does not reflect any fundamental difference between cable and DSL or other broadband services that might cause one service but not the other to fall within the ambit of the Act's definition of "telecommunications service." Indeed, the history that is relevant is the "evolution of advanced telecommunications regulation prior to the 1996 Act [that] reflects the same underlying belief that widespread access to 'basic' transmission facilities would spur competition in 'enhanced services' and provide consumers with a wider variety of more closely tailored products." Pet. App. 35a (Thomas, J., concurring, citation omitted).

4. Classifying cable modem service as partly a telecommunications service will not mean that all ISPs will become regulated

The FCC contends, in lockstep with its supporters, that if cable modem service is partly a telecommunications service, then all ISPs will become regulated – a result inconsistent with the Act's purpose. FCC Br. 36 (*citing* Pet. App. 101a); Cable Ind. Br. 20, 22. That contention is baseless.

First, to the extent that a cable operator combines the public sale of its high-speed cable pipeline with some information services, only the high-speed pipeline would be subject to regulation. § 153(44) (a "telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunication services"). The information services would remain unregulated.

Second, the FCC itself has consistently treated ISPs that merely lease transmission services from common carriers as customers of those carriers, and not as carriers themselves. *Universal Serv. Report*, 13 F.C.C.R. at 11,540, ¶¶ 106, 146-147. Nothing in the Act requires the FCC to treat these ISPs as common carriers. But even if ISPs that control no transmission facilities were carriers, nowhere does Congress suggest that the FCC must regulate the high-speed transmission service twice – once when the common carrier leases it to the ISP as its customer, and again when the ISP connects the service to its own customer. What the FCC repeatedly ignores is that somebody must provide a transmission service to the ISP, and that somebody is the entity that controls the transmission facilities.[20] With respect to the high-speed connection via a cable pipeline, that entity is the cable operator.

Despite the above, the FCC suggests that because the Act does not exclude non-facilities-based ISPs from regulation, the FCC would be compelled to regulate them if its statutory construction is not adopted. FCC Br. 36. Courts, however, "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). The FCC itself applied that principle in discerning congressional intent to maintain the Computer II framework that exempts ISPs which own no transmission facilities from regulation. *See Universal Serv. Report*, 13 F.C.C.R. at 11,540, ¶ 81. Viewing the Act in light of its history, the FCC stated:

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[20] The Telecommunications Industry Ass'n ("TIA") acknowledges that its members must purchase "telecommunications" transmission services from a common carrier in order to provide their information services. TIA Br. 15.

> [W]e note that at the time the statute was enacted, the Computer II framework had been in place for sixteen years. Under that framework, a broad variety of enhanced services were free from regulatory oversight, and enhanced services saw exponential growth. Accordingly, a decision by Congress to overturn Computer II, and subject those services to regulatory constraints by creating an expanded "telecommunications service" category incorporating enhanced services, would have effected a major change in the regulatory treatment of those services. While we would have implemented such a major change if Congress had required it, our review leads us to conclude that the legislative history does not demonstrate an intent by Congress to do so. As a result, looking at the statute and the legislative history as a whole, we concluded that Congress intended to maintain the Computer II framework.

Id. at 11,524, ¶ 45 (footnotes omitted).[21]

Thus, by the FCC's own admission, nothing in the Act suggests that the FCC must regulate non-facilities-based ISPs. At the same time, by conceding that Congress maintained the Computer II framework in the 1996 Act, unless the FCC exercises its forbearance authority under § 160, nothing in the Act permits the FCC to categorically exempt from regulation cable operators who control the

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[21] The FCC explained that the deletion of language that would have "expanded" the definition of telecommunications service was simply "intended to clarify that carriers of broadcast or cable services are not intended to be classified as common carriers under the Communications Act to the extent they provide broadcast or cable services." *Universal Serv. Report*, 13 F.C.C.R. at 11,523, ¶ 44.

transmission facilities over which information services are provided. It is not legitimate for the FCC to claim that Congress retained only that part of Computer II that supports its theory.

In the end, the issue is not that under the Ninth Circuit's interpretation of the statute all ISPs become regulated telecommunications carriers but that, under the FCC's statutory interpretation, all telecommunications carriers become unregulated ISPs. As a result, none of Title II's requirements, applicable only to telecommunications carriers, and the consumer protections attendant to them would apply to *any* entity that simply bundled its telecommunication service with information services for public sale. Not only would the mandatory funding requirements to support ubiquitous and affordable access to broadband service by school children, rural health care providers, and the disabled become a dead letter, but other provisions of the Act would suffer the same fate. Among other things, the FCC would be powerless to safeguard the privacy of a customer's proprietary information pursuant to § 222;[22] states would be unable to manage their public rights of way under § 253(c); and law enforcement would be hamstrung in securing the safety of all Americans under § 229. In short, far from being "'most faithful' to the 1996 Act and 'its policy goals of competition, deregulation and universal service,'" the FCC's interpretation could hardly be more destructive of them. FCC Br. 26. The FCC's interpretation cannot stand.

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[22] The FCC's claim that, under § 551, cable operators could be subject to privacy provisions, leads to the anomalous result that consumer privacy rights depend on the technology deployed, a result at odds with congressional intent.

CONCLUSION

Chevron requires a court to defer to an agency's statutory interpretation only if the agency's interpretation is reasonable in light of the statutory text at issue, construed in light of the statute's history, structure, and purposes. *General Dynamics*, 540 U.S. at 600. It is only after all of these "devices of judicial construction have been tried and found to yield no clear sense of congressional intent" that *Chevron* comes into play. *Id.* Here, the plain text of the statute's definitions dictates that the high-speed pipeline offered by cable companies to enable residential consumers to connect to the Internet is a "telecommunications service." Nothing in the definitions supports the FCC's view that the pipeline loses that legally distinct character just because a company chooses to market the pipeline with other services.

And even if the definitions were not perfectly clear on this point, the Act's purpose and structure, as informed by the Act's history, preclude the FCC's interpretation. The Act's central purpose is to promote affordable and universal access to the Internet. Its structure requires the FCC to classify the pipelines that provide that access as a telecommunications service, and to afford consumers the protections of Title II, unless the FCC makes the specific findings that § 160 requires to allow the FCC to forbear.

The FCC's interpretation of the statute undermines the Act's core purpose and structure by effectively putting the decision whether to be regulated into the hands of corporate marketing departments. This is not a result Congress possibly could have intended. Accordingly, for the

reasons stated, the judgment of the court of appeals should be affirmed.

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STATUTORY APPENDIX

47 U.S.C. § 153 Definitions

(20) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(43) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(46) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Advanced Telecommunications Incentives

Section 706 – Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended Pub.L. 107-110, § 1076(gg), Jan. 8, 2002, 115 Stat. 2093 (uncodified, but reproduced at note to 47 U.S.C. § 157) provided that:

(a) In general. – The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry. – The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In

the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) **Definitions.** – For purposes of this subsection:

(1) Advanced telecommunications capability. – The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools. – The term 'elementary and secondary schools' means elementary and secondary schools, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 7801].

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47 U.S.C. § 160 Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in

any or some of its or their geographic markets, if the Commission determines that –

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

. . . .

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47 U.S.C. § 254 Universal Service

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

. . . .

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

. . . .

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications service shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

. . . .

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care

services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall –

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules –

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; . . .

. . . .